FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 19

No. 65.

Supreme Court U.S.
FILED
NOV 7 1908
JAMES H. McKENNEY,
Clerk.

JACOB GERTGENS,
Plaintiff in Error,

vs.

JOHN P. O'CONNOR.
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

E. T. YOUNG and
STEVENS, O'BRIEN, COLE & ALBRECHT,
Attorneys for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 65.

JACOB GERTGENS,
Plaintiff in Error,

vs.

JOHN P. O'CONNOR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

As the record is voluminous and confusing, we submit the following synopsis of the "Stipulation of Facts," upon which the case was tried below.

The action involves the title to the land described in the complaint and other land similarly affected, all of which was embraced within the limits of the

indemnity grant for the St. P. M. & M. Railway Company, by act of March 3rd, 1865 (13 Stat. 526), section 7 of which is as follows:

"And be it further enacted that, as soon as the Governor of the State of Minnesota shall file or cause to be filed, with the Secretary of the Interior, maps designating the route of said road and branches, *then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act.*"

After filing of the map of definite location, by letter dated May 25th, 1869, the commissioner of the general land office, under instructions from the secretary, duly withdrew from the public domain and from settlement and entry the lands within said indemnity grant (Record fol. 96) and on April 22nd, 1885, they were all regularly selected by said company to make up designated losses within the "place limits" of its "Main Line" grant. In 1891, with the consent of the land department, such selection was amended by withdrawal of the specifications of losses first filed, and substituting therefor a specification of losses of "place lands" arising in the grant for the "St. Vincent Extension Railway" of said company (16 Stat. 588). By act of September 29th, 1890, (26 Stat. 496) said section 7 of the act of March 3rd, 1865 was repealed.

On May 22nd, 1891, the secretary of the interior, in a communication to the commissioner of the general land office, ordered that there be restored to the public domain, and opened to settlement and entry, "in accordance with the rules heretofore established in similar cases," the lands within said indemnity

grant of March 3rd, 1865. (Ex. "B," Record, fol. 143.)

On May 28th, 1891, the commissioner, by letter addressed to the proper local officers, (Ex. "C", R., fol. 150) directed them to proceed in the manner therein specified to restore to the public domain and to open to settlement and entry, "all land heretofore withdrawn in your district within the indemnity limits of the grant for the St. P. & M. Railway Company not embraced in selections heretofore made or applied for by said company." These directions were duly complied with; and thereafter, in the adjustment of said railroad grant, said selections were cancelled; expressly reserving, however, disposition of the lands in controversy until the claim thereto of Archbishop John Ireland of St. Paul, hereinafter referred to, should be finally adjudicated. (Ex. "I 1" R. fol. 166).

Meanwhile, on July 17th, 1880, a contract was made between said railway company and said Archbishop Ireland (Record, fol. 14-17) whereby he was given the exclusive right to place settlers on a designated portion of these indemnity lands, the same to be paid for at four dollars per acre when title could be obtained by the company. Under its authority said Ireland made contracts with a large number of settlers, who went upon the respective tracts so purchased by them, and continued to reside thereon; and each of them, by virtue of said contracts, afterwards acquired and received patent to the tract so purchased and occupied by him under

the provisions of the 5th section of the act of March 3, 1887 (24 Stat. 556).

On March 30th, 1883, a new contract was entered into between said railway company and said Ireland, (R. fol. 19-20) whereby, instead of agreeing to place settlers upon the land of the railway company, said Ireland contracted to purchase for himself 50,000 acres of the land described in the first contract, which then remained undisposed of.

His purpose throughout was to establish, on these agricultural lands, a colony of his own religious faith from among the immigrants flocking to the Northwest; and his efforts in this direction, commenced under his said first contract with the railway company, were continued for several years after the second contract was made. But thereafter he adopted a different form of contract with his vendees, to that used when he was operating under the contract of 1880. The essential difference between his contract with the settlers before and after March 30th, 1883, was that, under the latter, the settlers were required to look to *him* for their title; while, under the former, they were required to look for their title to the *railway company*.

Under his colonization scheme settlers were placed by said Ireland upon all of the lands included in the above described contracts, except upon about 8,000 acres which had been disposed of by him to persons who did not take up their residence upon the land.

A part of this latter land was purchased by de-

fendant in error, and includes the tract in controversy.

Upon these lands, so disposed of to persons who did not take up their residence thereon, certain persons located, claiming under the homestead law—the plaintiff in error being among the number—and this action will determine the rights of all such "squatters," as against said Ireland and his vendees.

All the persons who made contracts with said Ireland for the purchase of specific portions of this land, while he was operating under his *first* contract with the railway company, received title to their respective tracts directly from the *government*, as bona-fide purchasers from the railway company, under the 5th section of the act of March 3rd, 1887; and said Ireland was given title, under the same decision, to the lands covered by his *second* contract above mentioned (Rec. fol. 52-71). He was treated by the land department as having the rights, as a bona-fide purchaser under his contract of 1883, that were accorded the vendees who had dealt with him while he was operating under the contract of 1880. The land thus conveyed to him by the government was immediately conveyed by him—or through his trustee (The Minneapolis Trust Company)—to the several individuals to whom he had sold the same, many of whom were occupying the land; although a few, like the defendant in error, were not residing thereon. Before this action was begun, the title to all the lands covered by both contracts had passed from the government under said 5th section of said act of 1887; a part

directly to said vendees of said Ireland, and the rest directly to him. No question is raised as to the title of any of the lands, except the portions owned by purchasers from said Ireland, who did not reside upon the land purchased.

On April 15th, 1891, plaintiff in error, a qualified homesteader, settled upon the land in controversy, but offered no homestead application therefor until April 27th, 1895. His proferred homestead filing of that date was rejected by the local land officers on account of the pending selections theretofore made by said railway company. From their decision he duly appealed to the commissioner of the general land office. This appeal was never further considered in the land department, except to the extent of giving the claimant therein notice of the application made by said Ireland to make proof and payment for the land as a purchaser thereof as above stated.

It appears from the stipulation that the question of said Ireland's right to make proof and payment for this land under the 5th section of the act of March 3, 1887, has been considered, and adjudged in his favor by the officers of the local land office; the commissioner of the general land office; the secretary of the interior; the district court, and the supreme court of Minnesota.

Referring to the "Stipulation of Facts" (Record, fol. 95-141), although it contains more than one hundred distinct allegations or statements of, or in re-

spect of, past or existing facts, events or circumstances, most of them are in the nature of introductory recitals or in identification of the exhibits set out in the record. The foregoing synopsis contains all that is essential to the proper consideration and decision of the case.

Scope of this Review.

By the prosecution of the writ herein, error is imputed to the supreme court of the state of Minnesota; and we assume that only such errors, if any, in matters of law, in the decision and judgment of the supreme court, as appear therefrom, and from the opinion filed therewith, to have occurred, to the prejudice of plaintiff in error, will be considered here.

We further assume that, no matter how erroneous the decision and judgment of the trial court may have been, either in arriving at one or more ultimate or inferential facts, or in one or more of its conclusions of fact or of law—yet, if, for any reason, or upon any ground, the *evidential* facts would have justified a judgment for the plaintiff; or, if not, and yet if the error was not properly taken advantage of—in either or any of those events, the supreme court was right in affirming such judgment of the trial court.

Also that if for any reason, or upon any ground, the supreme court would have been justified in affirming such judgment of the trial court, either upon the ultimate facts found by it, or

any of them—whether because of stipulation, proof or waiver, or under any applicable rule of law; or, again, if the supreme court committed error and such error related to matters of fact, or of mixed law and fact—in any of those cases, this court will not reverse the judgment of the state supreme court.

Whether we are right or not, upon all or any of these propositions, it is important to ascertain, at the outset, the precise character and operation of the decision and judgment of that court. The judgment, in terms, is an affirmance of that of the trial court in favor of the plaintiff therein—defendant in error here—and *that* judgment "adjudged and determined that said plaintiff (was) the absolute owner and entitled to the immediate possession of" (the premises in controversy).

Plaintiff in error claims that, through a misconstruction of the law by the officers of the land department, the legal title to the land which should have been given to him, under his homestead application, was given to said Ireland; and, in this action, he seeks to bring his claim within the rule of Johnson v. Towsley, 13 Wall. 72.

The three principal points of the controversy therefore are:

1. *Is the title of defendant in error, as adjudged by the land department, open to question anywhere, by anybody?* If so, then,

2. *Did plaintiff in error have such a vested right to the land in controversy as to be in position to question the act of the government in conveying its land to said Ireland?*

If so then, - ,

3. *Was said Ireland, under his contract of March 3rd, 1883, a bona fide purchaser of the land in controversy, within the intent and meaning of the 5th section of the act of March 3rd, 1887?*

We will now take up these questions in their order.

I.

Is the action of the land department conclusive?

The answer to this depends to a considerable extent upon whether the determination of the land department that said Ireland was a "purchaser" from the railway company, within the meaning and intent of the 5th section of the act of March 3, 1887, was the decision of a question of fact, or a question of law, or a mixed question of law and fact.

This we believe to be the controlling question. If this court holds with the supreme court of Minnesota, that the matter of said Ireland's qualification as a purchaser under this section was a question of fact, the decision of the land department thereon was final and cannot be questioned elsewhere.

In this connection we desire to call the attention of the court to the order of Secretary Vilas as reported in 8 L. D. 27-29, where he says:

"Inasmuch as the privilege conferred by this act is but a preferred right of purchase—a special pre-emption right— which would be perfected by the payment of the price of the land and the issue of cash entry certificate, as in pre-emption entry, it would seem eminently proper to adopt the same mode of procedure, so far as applicable, as is used in making final proofs in that class of cases."

Again on page 277 of the decision in Union Colony Co. v. Fulmele, et al., (16 L. D. commencing at p. 273) it is further declared that the distinction between this section of the act of 1887 and the general pre-emption law is that, under this act, there is no limitation as to the quantity of land that a purchaser may be allowed to enter. The secretary there says:

"For what land the purchaser has bargained, he may make payment to the United States at the ordinary price for like land, and thereupon patent shall issue therefor."

It is clear from these decisions and from the terms of the act itself, that an applicant under this section is a special *pre-emptioner*, and that all matters affecting his status as a purchaser from the railway company, as well as his citizenship, are matters which constitute his QUALIFICATIONS as such special pre-emptioner.

In Vance v. Burbank, 101 U. S. 519, the decision of the land department upon the qualifications of a patentee under the "donation act" (9 Stat. 496), was

assailed. That act required the department to find that the applicant was a settler or occupant, that he was over the age of 18 years; that he was a citizen of the United States or had declared his intention to become such; that he had resided upon and cultivated the lands for four consecutive years, and had "otherwise conformed to the provision of the act." The court said:

"The question in dispute is one of fact, that is to say, whether Scott, when he demanded his patent certificate as against the other contesting claimants, had resided on and cultivated the land in dispute for four consecutive years, *and had otherwise conformed to the requirements of the donation act.* This was to be determined by the land department; and, as there was a contest, the contending parties were called upon in the usual way to make their proofs. They appeared and full opportunity was given Scott to be heard; he presented his evidence and was beaten, after having taken the case through by successive stages on appeal to the secretary of the interior. This, in the absence of fraud, is conclusive *on all questions of fact.* We have many times so decided. The appropriate officers of the land department have been constituted a special tribunal to decide such questions, and their decisions are final to the same extent that those of other judicial or quasi-judicial tribunals are.

"It has also been settled that the fraud, in respect of which relief will be granted in this class of cases, must have been practiced on the unsuccessful party and prevented him from exhibiting his case fully to the department; so that it may properly be said that there has never been a decision in a real contest about the subject matter of the inquiry. False testimony, or forged documents, even, are *not enough* if the disputed matter has actually been presented to or considered by the appropriate tribunal. The decision of the proper officers of the department is in the

nature of a judicial determination of the matter in dispute."

In the case of Bishop Iron Co. v. Hyde, 66 Minn. 24 (31), which was affirmed here (177 U. S. 281), the court, citing above case as its authority, says:

"The competency of the defendant to comply with the requirements of the pre-emption act—his qualification as a pre-emptor—WAS A QUESTION OF FACT, peculiarly for the determination of the officers of the land department. It has repeatedly been held that the decision of these officers is conclusive on a question of fact, in the absence of fraud."

In the case of Potter v. Hall, 189 U. S. 292, the territorial court decided that Potter held the land in trust for the defendant because he was disqualified from making a homestead entry in the Oklahoma tract by having gone within its limits during the prohibited period; and that the action of the land department in holding to the contrary was an error of law and was not conclusive upon the court. In the opinion of this court, delivered April 6th, 1903, it was said:

"It remains only to consider whether error was committed by the department—in finally ruling that the entry made by Potter on the morning of the 22nd of May, before he returned to the land to take part in the race—which involved error of law reviewable by the courts. But, as such entry did not, as a matter of law, preclude Potter's right to go outside of the territory and take part in the race for land, but depended upon whether, as a matter of fact, he obtained by his previous going into the territory a substantial advantage over others, which he would not have otherwise possessed, it follows that the final conclusion of the department that no such advantage resulted, INVOLVED BUT THE FINDING OF AN ULTI-

MATE FACT, AND NOT A CONCLUSION OF LAW, AND IT IS THEREFORE NOT REVIEWABLE. The fact that the final conclusion as to the ultimate facts reached by the department differed from the conception of such ultimate facts entertained by the department in previous stages of the controversy, affords no ground for disregarding the conclusion of ultimate fact finally reached which was binding between the parties."

We invite attention also to the opinion of the Minnesota supreme court in this case upon the same question. (Record, fol. 115-117).

II.

IF ACTION OF LAND DEPARTMENT NOT CONCLUSIVE CAN PLAINTIFF IN ERROR QUESTION IT?

The answer to the above question depends upon the status of the land from the date of the grant on March 3rd, 1865, to the time of its conveyance by the government to said Ireland.

This requires consideration of—

1. Section 7 of the act of March 3, 1865, and its repeal by the act of September 29th, 1890.
2. The executive withdrawal of the land under date of May 25th, 1869, and its limited revocation in 1891.
3. The status of a purchaser under the 5th section of the act of March 3, 1887.

Counsel for plaintiff in error strenuously contend that section 7 of the act of 1865, which declared it to

be the duty of the Secretary of the Interior, upon the filing of the map of definite location of the road, to withdraw the land from settlement, was self-executing and effected a legislative withdrawal.

Not only are the stipulation (R. fol. 95) and decision (R. fol. 183) directly to the contrary, but such a contention needs no other refutation than is afforded by the reading of the section. Language could not well be plainer. Congress had power to make the withdrawal; but, instead of doing so, it made it the duty of the secretary to act, when the map of definite location should be filed. His action was executive, not legislative.

Counsel make the unwarranted claim that the withdrawal was solely legislative, in order thereby to lay the foundation for their other claim that the repeal of said section 7 of the act March 3, 1865, by the act of September 29th, 1890, *revoked the withdrawal.* If the first contention were true, the truth of the second would certainly follow. No authority is needed upon the proposition that the unconditional repeal of a law ends its existence. It seems equally clear that a mere "withdrawal," which gives no vested right in land, if made solely by a statute, could not survive the repeal of the statute.

But no proposition is better established than that the Secretary of the Interior has the power, *virtute officii,* to make withdrawals of the public lands.

Wolsey v. Chapman, 101 U. S. 755.

Wolcott v. Des Moines, U. & R. Co., 6 Wall. 681.

Spencer v. McDougal, 159 U. S. 61.

The conditions of the exercise of that power in aid of land grants are discretionary, where the grant is silent on the subject. In this instance congress expressly directed the withdrawal to be made, and converted the discretionary power into a positive duty. In like manner, by the act of September 29th, 1900, when congress desired to invest the secretary with the discretionary power to revoke the withdrawal at his will, it repealed the section which had required him to make it. By neither act did congress enlarge or diminish the general powers theretofore possessed by the secretary.

The Secretary of the Interior, discussing this question in his letter of May 22nd, 1891, to the commissioner, wherein he directed the revocation of the withdrawal (Ex. "B" R. fol. 142) says:

"It is within the authority of the department to revoke an executive withdrawal of indemnity land. If the indemnity withdrawal for the benefit of the St. P. & S. C. R. R. Co. was made under legislative direction contained in *section 7, act of March* 3, 1865, no legal objection can now be made to the revocation of such withdrawal, as said section is repealed by the act of September 29th, 1890." (R. fol. 146).

Counsel for plaintiff in error, with equal disingenuousness, contend that the secretary's letter of May 22nd, 1891, to the commissioner—who is the administrative officer of the land department—in which he directs that, after the usual notice, the

lands "be restored" to settlement according to rules theretofore established, operated, *ipso facto*, as a revocation of the withdrawal; and that it effected a restoration of the land to settlement, regardless of rules or the subsequent action of the commissioner or local officers to the contrary. The commissioner must have been as incapable as we, of understanding the secretary's letter of May 22nd, if it had the meaning or effect contended for by counsel. He seems not to have been aware that either the act of September 29th, 1890, or the secretary's letter of May 22nd, 1891, communicating to him—the administrative head of the land department, for execution, the secretary's decision and *direction to have the withdrawal revoked in the usual way*, had itself revoked the withdrawal; because, on May 29th, 1891 (Record, fol. 93) he—the commissioner—instructed the *local land officers*, with reference to this grant as follows:

"YOU are directed to RESTORE to the public domain and open to settlement and entry, all lands heretofore withdrawn in your district within the indemnity limits of the grant for the St. P. M. & M. Railway Company *and not embraced in selections heretofore made, or applied for by said company.*" The only action ever taken by the local officers in this or any other like matter was in obedience to the above or similar instruction of the *commissioner*. It is therefore, as unreasonable to claim that there was an unconditional revocation of the withdrawal, as to lands "*embraced in selections theretofore made or applied for by said railway company*," *and then*

pending in the department, as it would be to assert that a declaration of war is equivalent to the unconditional surrender of the enemy.

If, then, the lands were not opened to settlement by this proceding of the department, it follows that they remained withdrawn and not subject to settlement or entry—at least until the order of October 23, 1896, by which the selections above referred to were cancelled (Ex. "I-1" Record, fol. 101). But the concluding language of this order of cancellation is as follows:

"A large portion of these lands have been applied for by parties claiming them under the settlement laws, and by said Ireland, who claims under act of March 3, 1887 (25 Stat. 556), as a purchaser from the St. P. M. & M. Railway Company. *No disposal will be made* of these lands until the above claims are *adjudicated* by this office. So advise the parties in interest!"

The lands were certainly not opened to settlement or entry by *this* order; but, as expressly stated therein, and as held by the supreme court of Minnesota, they were still withheld until adjudication by the general land office of the claims of said Ireland and the plaintiff in error and of the parties who were contesting his right to a portion thereof. The next day—October 24, 1896—(Ex. "K" Record, fol. 102) the commissioner directed the local land officers to allow said Ireland, under his then pending application, to make proof of his claim to said lands as a purchaser from the company; and thereupon his

proof was made and accepted and the land conveyed to him.

Counsel for plaintiff in error contend that there is a rule of the land department with reference to the public lands to the effect that an intending settler, by mere occupancy, may acquire a vested right in land *not subject to entry*. We know of no such rule, and this court has decided that occupancy without entry, made or offered, confers no right whatever.

Northern Pac. R. R. Co. v. Colburn, 164 U. S. 383.

Nelson v. Ry. Co., 188 U. S. 108.

Neither do we get any light whatever upon the effect of the withdrawal in this case by reference to or quotation from cases cited by them of Hewitt v. Schultz, 180 U. S. 139; or Oregon & C. Ry. Co. v. U. S., 189 U. S. 103. In each of them the court held that the language of the grant there under consideration *prohibited* a withdrawal of the idemnity land, and that withdrawals of such lands, attempted to be made in violation of such prohibition, were void.

The reason for this is that the court construed the words "the lands hereby granted" in the acts there in question to be limited in their application to lands within the original or "place" limits," and, in the opinion in the latter case, the amendment of March 3, 1853 (10 Stat. 244) to the pre-emption law of 1841, is discussed and a partial list was given of rail-

road land grants in which the limitation, which was held in those cases decisive, occurred.

The difference between the language of those grants and that here under consideration, and its significance, is so apparent as to need no comment.

We therefore contend that, because of the executive withdrawal of the land, which was *never* revoked or abrogated as to this tract, the plaintiff in error never acquired any vested right therein by his occupancy thereof, *and cannot be heard to question the Ireland title in this case.*

In Hamblin v. Western Land Co., 147 U. S. 531, where land was similarly withdrawn, this court said:

"As, therefore, the land was so situated that Hamblin could not make a valid homestead entry, it follows that he is not in a position to question the conveyance of the legal title by the patent from the government."

See also

Bullard v. T. T. Co., 122 U. S. 167.

Bohal v. Dilla, 114 U. S. 49.

Spencer v. McDougal, *supra.*

But, irrespective of the unrevoked executive withdrawal, we contend that, under the provisions of the act of March 3, 1887, said Ireland had a vested right to the land, growing out of his contract with the railway company of March 30th, 1883, which became perfect October 23rd, 1896—when the railroad selections were cancelled—and which was paramount to any right the plaintiff in error could acquire by his settlement commencing in 1891.

Secretary Noble, in his order of December 19, 1890, to the commissioner (11 L. D. 607-610), discussed the section under consideration and its provisos, with reference to the Omaha grant, and said:

"In your letter of February 14th, you also call attention to the fact that the departmental instructions, approving the final adjustment of the Omaha grant and directing the restoration of the surplus lands to the public domain, *made no provision for the protection of purchasers from the company under said section and act;* and you invite attention to the conflicts likely to arise between the claims of such purchasers and those of parties claiming as settlers. It is suggested that a time be fixed within which purchasers under said act should be required to come forward and make proof, and otherwise comply with the requirements thereof. I have no doubt of my authority, in the administration of the law, to make such a requirement, and approve of your suggestion to that effect." He then directed that such purchasers be given 90 days notice to come in and avail themselves of their preference right, and that the restoration of the land to the public domain under his former order be suspended until such time had elapsed.

Union Colony v. Fulunte, 16 L. D. 273.

"The right of purchase under said section is not defeated by an adverse settlement, made after the passage of the act." (Sec. Smith).

Yocum v. Keystone Lumber Co., 22 L. D. 558.

"The right of one who purchased land from a railroad company, prior to the passage of the act of March 3, 1887, to perfect title under section 5 of said act, is superior to the settlement right of another, acquired after the passage of said act."

Skinvik v. Longstreet, Id. 32.

Jenkins v. Dreyfus, 19 L. D. 272.

Union Pac. Ry. Co. v. Norton, Id. 524.

This section was adopted solely as a relief measure. It is retrospective and not prospective in its operation; its design is remedial, not originative, and it is therefore within the rule that remedial statutes are to be liberally construed with a view to affording the intended relief. Such has been the uniform practice of the officers of the land department since its enactment.

The 5th section of the act of 1887 recognized and provided for a class of claimants for lands of the character to which it applied, whose rights could not be affected by subsequent settlement of others upon the lands, even if there were no withdrawal. Lands affected with the conditions mentioned, were appropriated by the terms of that section to this class of claimants. The right of purchase conferred by that act, thus absolute in its terms, was indivestable by one who went upon the land after 1887, whether before or after the railroad claim was cancelled—unless the railroad contractee should lose by laches his prior right thus conferred.

It is evident that congress understood and intended that the rights given by this act to its beneficia-

ries would take precedence over the rights of settlers under the homestead and pre-emption law; and, by the provisos of section 5, sought to protect certain claimants under those laws from its operation. By the first proviso it exempted from the priority given to purchasers, all bona fide homestead or pre-emption claimants who were occupying the lands *at the time the contract with the railway company was made;* and, by the second proviso, all lands were excepted, which were settled upon by homestead or pre-emption claimants, subsequent to December 1, 1882, and prior to the passage of the act. Having *excepted* from the operation of the act these *two* specific classes of homestead and pre-emption claimants, it necessarily left all *others subject* to its provisions.

These provisions were engrafted upon the pre-existing land grnat acts, and all persons who came within its terms were given rights which, upon the cancellation of the railroad grants, took effect, by relation, as of the date of the contract made with the railway companies. After the passage of that act, the cancellation of the railway companies' rights to the lands included in any such grant would not restore such lands to the public domain, as against such purchasers.

There were no settlers on this land at the date of the Ireland contract or at the time of the enactment of the law of 1887; so that there was no obstacle to such disposition of it as the government—its absolute owner—saw fit to make.

The plaintiff in error, who settled upon the land

in 1891, and did not offer a filing until 1895, could hardly expect priority over a purchaser from the railway company whose contract was made March 30th, 1883.

III.

WAS SAID IRELAND A PURCHASER IN GOOD FAITH WITHIN THE INTENT OF THE ACT OF 1887?

THIS INVOLVES FIRST, A CONSIDERATION OF THE CONSTRUCTION OF THE ACT OF 1887.

The subject has come before the land department several times since the passage of the act in 1887, and our contention is in harmony with the uniform rulings of the department.

An examination of some of the cases in which relief under this section has been sought and obtained in the land department by claimants, and a comparison of the character of the contracts therein involved with the contract in question here, will be instructive.

The case of Samuel L. Campbell, 12 L. D. 247, appears to be the first reported in the published decisions of the department.

The "contract" in that case was not given in the decision, but the record shows it as follows:

"Circular relating to the lands of the Southern Minnesota Railway Company.

By an act of congress, approved July 4th, 1866, entitled "An act making an additional grant of lands

to the state of Minnesota, in alternate sections, to aid in the construction of railroads in said State," certain lands were granted to the state of Minnesota for the purpose of aiding in the construction of a railroad from Houston, in Houston county (at the time the western terminus of the Southern Minnesota railroad), to the west line of the state. By an act of the legislature approved February 25, 1867, the state accepted the trust created by this act of congress, and granted the lands to the Southern Minnesota Railroad Company.

The Southern Minnesota Railroad Company, having failed to complete its road within the time prescribed by the acts of congress and of the state legislature, such of the lands as have not been acquired by that company by the completion of a portion of its line, were, by an act of the legislature of Minnesota, approved March 6th, 1878, transferred and granted to the Southern Minnesota Railway Extension Company, on the condition of the completion of the line of road of that company to Fairmont, in Martin county, before September 1st, 1878, and to Jackson, in Jackson county, before the end of the year 1879, and to the west line of the state before the end of the year 1889. This company is now engaged in the construction of its line of railroad, and completed the first section, from Winnebago City (the terminus of the Southern Minnesota Railway) to Jaskson, on December 2nd, 1878, and intends to build to the west line of the tate during the year 1879.

By the completion of its line to Jackson, the com-

pany became entitled, under the before mentioned acts of congress and the state legislature, to about 40,000 acres of land in Martin and Jackson counties; and, by extending to the west line of the state, it will become entitled to about 139,000 acres, situated in Rock, Murray and Pipestone counties; but, until the lands are absolutely conveyed by the United States to the state of Minnesota, and by the state to the company, there will remain a doubt as to the eventual acquirement of the lands by the company—a doubt based upon the fear that some technicality may cause the lands to be withheld by the general government; and, while the company, in the belief that it will secure an unquestionable title to the lands at an early date is, in good faith, complying with the terms of the several acts relating thereto, it must be clearly understood by all persons desiring to settle on the lands under the terms herein proposed, that the company may possibly fail to secure title; and that, in such event, settlers will be obliged to protect themselves by pre-emption or homestead entry or otherwise.

In order that the settlement of these lands may not be delayed, the company will issue permits to parties desiring to enter upon them and commence improvements. These permits will entitle the parties to the lands from the company, on the terms herein proposed, on its securing title thereto, on condition that they shall, in good faith, commence improvements at once, and shall put under cultivation within twelve months from the date of the permit, at least forty per cent of the lands taken; and

that they shall, within sixty days after receiving notice from the land commissioner of the company that the company has secured title to and is ready to make a formal contract or deed of the lands, make such payments as may then be due on the lands, and execute contracts or notes and mortgages to secure the deferred payments, as hereinafter provided.

The company reserves the right to revoke, without notice, any permit which may have been issued, in case of non-compliance with these conditions; and, in case of the failure of the company to obtain title, then this permit is to be void and of no effect.

To secure the immediate settlement and cultivation of the lands, the company offers them on the following easy terms:

Payments will, as a rule, be required at the rate of one dollar per acre, per annum, with interest on deferred payments, at the rate of seven per cent. per annum, payable annually.

"Interest."

"(Interest to be settled at the General Office S. M. Ry. Co., M. Conant), and the first payment of principal and interest will be due one year thereafter, but no payment of principal or interest will be required until the company is able to convey the lands by warranty deeds.

Special credits will be given as follows: For all lands broken by the 15th day of July, inst., after permit, a credit at the rate of $2.50 per acre of land broken. For all lands seeded in grain prior to July 1st 1881, an additional credit of 50 cents per acre will be given, but this will not apply to a second

seeding of the same land. These credits will be applied, as far as they will go, on the first payments due on the lands, principal and interest.

Right of way and the necessary additional ground for the erection of screens for protection against snow will be reserved for the Southern Minnesota Railway Extension Company.

Further information may be obtained on application to the undersigned,

MARSHALL CONANT,
Land Commissioner."

La Cross, Wis., March, 1879.

"Southern Minnesota Railway Extension Company Eastern Division.

Permit.

No.....

Mr. S. L. Campbell having applied for this permit (as appears by his signature hereto) the Southern Minnesota Railway Extension Company hereby authorizes him to enter upon and improve the whole of section No. one, of township No. one hundred and two, of range No. thirty-two, in Martin county, Minnesota, in accordance with and subject to the terms and conditions of the foregoing circular, which is hereby made a part of this permit.

The price fixed upon the tract described herein is seven dollars per acre. In case of compliance with the terms of this permit and of said circular, and in case the said company obtains title to said land, the same will be conveyed to said S. L. Campbell by warranty deed; but in case of failure on his part to comply with the same, then these presents shall be

deemed and construed to have been a lease, and to have created the relation of landlord and tenant in respect to said land; that is to say, between the said company, as lessor, and the above named applicant, as a tenant holding over after expiration of his term, and of his right to do so; and the said company may thereupon accordingly take possession of said land and any improvements thereon by summary proceedings, pursuant to statute as for unlawful holding over and detention of the same after the expiration of such lease, and may do so with or without prior notice, saving to him, however, permission to remove any growing crops put upon the ground by him, and to enter upon the premises at reasonable times for that purpose only. Right of way, as per first page, reserved.

In witness whereof, the said company has executed these presents by its land commissioner, and the said applicant has also subscribed the same.

Dated May 2nd, 1879.

(Signed) S. L. Campbell, Applicant.

The Southern Minnesota Railway Extension Company.

(Signed) By M. Conant, Land Commissioner."

Signed in Duplicate.

Hon. S. M. Stockslager, then acting commissioner of the general land office, submitted Campbell's application to purchase under this contract, to the secretary of the interior, whereupon that officer gave directions as to method of procedure under the act of March 3, 1887 (8 L. D. 27).

In due time Campbell submitted his proof, consisting in part of a copy of the foregoing agreement, which was duly examined by the commissioner who, after some additional evidence had been furnished pursuant to his request, transmitted the papers to the secretary of the interior, with a report containing the following recommendation:

"In response to this requirement copies of papers were forwarded to this office tending to show that on May 2, 1879, the railway company issued a permit to Campbell to enter upon and improve all of section 1, T. 102 N., R. 32 W., agreeing to sell to him for seven dollars per acre, with certain drawbacks or credits for breaking and seeding to be done within prescribed periods, so much of said section as the company should eventually acquire title to; it being understood and agreed by the parties that, if the company should fail to acquire title to any portion of said section, Campbell should protect his interest in or improvements upon such portions by entries under the public land laws; and that if Campbell should fail within sixty days after receiving notice from the land commissioner of the company that the company has secured title to, and is ready to make formal contract of sale or deed of the lands, to make such payments as may then be due on the lands and execute notes or mortgages to secure the deferred payments, then these presents shall be deemed to have created the relation of landlord and tenant in respect to said land and the improvements thereon.

"No payment of any kind was to be made by

Campbell to the company until the company should be able to convey the lands by warranty deed, and by the terms of the permit, the company reserved the right to revoke the same, without notice, in case of non-compliance with its conditions. It was also provided that in case of failure of the company to obtain title, then this permit is to be void and of no effect.

"The company acquired title in 1880 to all of said section except the tracts embraced in Campbell's entry, and, on January 3, 1881, two formal contracts of sale embracing the N. ½ and N. ½ S. W. ¼ of the section were executed by and between Campbell and the company, and he surrendered the permit issued to him in 1879, but the same does not appear to have been cancelled upon the company's books, and it was understood that, should the company acquire title to the remainder of the section, Campbell should be allowed to purchase the same, but no writing to that effect was made.

"Upon receiving the permit Campbell took possession of the entire section and made extensive improvements thereon, the entire S. ½ S. W. ¼ and about thirty-five acres of the S. E. ¼ having been broken by him. He made no payment on these tracts, and the land commissioner of the company certifies that no credit for the breaking done thereon have been allowed him.

"The 5th section of the act of March 3, 1887, is a relief statute and should be liberally construed so that it may not fail in its object, and that equitable rights may be protected.

"The word sold as used in said section, is, in my opinion, intended to embrace all bona fide transactions between individuals and the company contemplating either a present or future actual transfer of title, and the arrangement entered into by and between Campbell and the company in 1879, and verbally renewed in 1881, is such as to bring the transaction within the intention, and constitute a sale within the meaning of the 5th section of the act of March 3, 1887."

Upon consideration of this report, and the proof submitted by Campbell, the secretary concurred in the opinion expressed by the commissioner and decided that the agreement between Campbell and the company was such as to bring Campbell within the intent of the act, and, therefore, allowed him to purchase the land thereunder. (See 12 L. D. 247.)

Plaintiff-in-error assails the Ireland contract of March 30, 1883, as being a mere option, without mutuality or consideration, entered into with full knowledge that the company had not the title.

In the light of the Campbell contract—fairly bristling with information that the company did not own, and might never acquire, title to the land embraced therein; and expressing in almost every line the doubt that title would ever come to the company; declaring over and over again that it was a mere permit to settle, and not a contract of sale—a mere promise by the company that upon the oc-

currence of certain events it would sell the land to Campbell, but in no way binding Campbell to buy—we cannot see how the sufficiency of the Ireland contract can be assailed, if the Campbell case was correctly decided.

In the Campbell contract it expressly declared that no consideration should be paid until the company was prepared to make good title; then the piece was to be $7.00 per acre, with allowances—in certain cases—amounting to $3.00 per acre, leaving the net price only $4.00 per acre. In Ireland's case the company accepted services previously rendered in placing settlers upon its land as sufficient consideration for the privileges granted him (and they were of a kind with the services for which Campbell was to receive credits) and the price ultimately to be paid by Ireland is specifically stated at $4.00 per acre, with a discount of 10 per cent at time of payment. If the consideration in the Campbell case was sufficient, and that counsel concedes, it is difficult to see wherein that in the case of Ireland is deficient.

The entire record in the above case has been given in full because of its striking similarity to this, and because the policy of liberal construction, which the department has consistently presented in all cases arising under this law, was therein first promulgated.

In numerous other cases agreements in all essential features similar to that here in question, have been considered and upheld by the department as

sufficient under the act.

Telford vs. Keystone Lumber Co., 18 L. D. 176, and 19 L. D. 141.

Union Pacific Railway Company vs. Norton, 17 L. D. 314;

Jenkins v. Dreyfus, 19 L. D. 272.

Holton v. Rutledge, 20 L. D. 227.

Stephan v. Morris, 21 L. D. 557.

Austin v. Luey, 21 L. D. 507.

The special attention of the court is respectfully invited to the case last cited, wherein Mrs. Austin was permitted to make purchase under this law, although it does not affirmatively appear that any written contract was executed between her and the railway company, and it was shown that on numerous occasions the company had refused to convey the land and informed her that it did not own the same. Commenting on this case, the Secretary of the Interior (p. 511) used the language respecting the spirit and intent of the act of 1887 and the sufficiency of contracts thereunder as follows:

"When we come to consider the spirit and purpose of the act of March 3, 1887, I think it will be apparent that it was intended to cover contracts other than those evidenced by a deed, since it applies exclusively to lands sold or contracted away by railroad companies *before such companies had themselves obtained title or patent*, obviously the terms "*purchase and sale*," as used in said act, are not to be understood in their technical and limited meaning; but rather in their widest and most comprehensive meaning; which would, I think, include such contracts for the sale of lands as had been performed in whole or in part by the purchaser; or as

had resulted in the occupancy and improvement of the lands, no matter how the contracts were evidenced, so that they were clearly and satisfactorily proven. Certainly, congress did not proceed upon the idea that the companies, as a rule, would execute deeds before they obtained patents; nor did they intend to exclude from the provisions of the act all contracts with reference to sales, which were not evidenced by the execution of a deed."

In the case of Grandin et al. v. La Bar, 23 L. D. 301, the secretary says:

"Purchase, in its broad and liberal sense, includes every mode of acquisition save that of descent, and, in the most narrow sense in which it was ever employed, it means acquisition by the payment of a price of money. But neither of these is the popular sense. In common use, and generally in statutes, as the supreme court says, "the word is employed in a sense not technical, only as meaning acquisition by contract between the parties." (91 U. S. 374.)

It is inconceivable that, in this remedial act, the word is used in the restricted sense contended for by counsel. On the contrary, it cannot be doubted that the object was to protect all persons who had parted with a valuable consideration, whether in money or other property, in consideration of the transfer of lands for which the company could not and did not pass valid title. This construction gives effect to the undoubted purpose of congress, and is not inconsistent with any canon of interpretation. The provisions of the act apply to indemnity, as well as place lands.

Durrell vs. Windom, 23 L. D. 508.

Where a party bargains for property which he knows the other party does not own at the time, and the subsequent acquisition of which depends upon a contingency, he cannot be what, within the strict terms of the law, would be called a "bona fide purchaser." He has notice of the defect in the title. For the reasons stated by this court in U. S. vs. Ry. Co., 165 U. S. 463, it is clear that the term "bona fide purchaser", as used in this statute, is not to be taken in its strict or literal sense. It is intended rather to indicate one who made a contract, intending to purchase and expecting to get the title in that way.

In view of the liberal construction uniformly placed upon this section by the land department, and the large number of cases in which contracts like that in the Campbell case have been upheld, it is worthy of consideration that counsel for plaintiff-in-error are not able to direct the attention of the court to any decision of either a state or federal court, holding that such broad and liberal construction of this law by the land department was erroneous; or any case where a decision of the land department in favor of a purchaser under this law, has afterwards been overturned in the courts. A long and uniform course of construction of a statute by the tribunal expressly charged with its administration, is entitled to great respect.

In U. S. vs. Moore, 95 U. S. 760, this court said: "The construction given to a statute by those charged with the duty of executing it is always entitled to

the most respectful consideration and ought not to be overruled without cogent reason. The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret." (See also Brown vs. U. S. 113 U. S. 568 (571); U. S. vs. Railway Co., 98 U. S. 334-341; Ry. Co. vs. Ry. Co., 112 U. S. 414-418.)

Counsel for plaintiff-in-error contend for a *strict construction* of this section, and insist that no one should be considered a purchaser thereunder, *unless his contract is one that could be specifically enforced in the courts.* They devote over fifty pages of their brief to the citation and discussion of cases where various contracts have been held defective and insufficient, as between the parties in actions brought for their enforcement. These are all cases to compel a performance of a contract by an unwilling party; such a case presents the severest test to which a contract can be subjected, and the courts in such cases apply the rule of strictest construction.

This is a case where the contract involved has been voluntarily executed, and the plaintiff-in-error in effect asks that the performance be set aside; upon the asserted ground that the contract could not have been specifically enforced had the parties refused to comply with its terms. When this contract was made the only parties interested were said Ireland and the railway company. They both treated it as valid, and have complied with its terms. He by selecting the land in small

tracts, and selling the same to his vendees; the railway company, accepting this as performance on his part, designated all of these lands on their plats and maps as "Ireland lands." It is plain that thereby these lands were "appropriated" to the Ireland contract, long before plaintiff-in-error settled thereon. If the rights of the parties depended upon the contract as originally made, without anything having been done thereunder, by either Ireland or the railway company, it might be subject to many of the criticisms urged against it. But, if it was but an "option" at the beginning and lacked a sufficient description of the lands intended to be covered thereby, these elements of uncertainty were removed when the lands were afterwards selected, and sold by said Ireland with the knowledge of the company.

After the railway company's selections were cancelled the only parties interested in the contract were said Ireland and the government, and here again both parties were satisfied with it, and accepted it as sufficient.

We insist that no fair construction of the contract is possible that does not take into consideration not only the terms of the contract itself, but the circumstances in which it was made; the things that have been done by both parties in performance of its terms and conditions, and the construction and interpretation put upon it by the parties themselves, by their subsequent acts and dealings thereunder. We have seen that said Ireland, with the knowledge

and approval of the railroad company, proceeded to advertise and to procure settlers and make sales of the land and long before the plaintiff-in-error attempted to make homestead entry had disposed of all of said lands and issued contracts binding himself to give title to his vendees, upon conditions therein stated.

At the time when plaintiff-in-error claims to have acquired rights to this land, the contract between said Ireland and the railway company had been so far executed that neither party to it could escape from the full performance if the railroad company had obtained title to the land. Said Ireland had bound himself by all the contracts to his vendees to furnish them with title; so that the claim of counsel for plaintiff-in-error that said Ireland was so situated that he was under no obligation to perform this contract if the railway company had acquired the land, is entirely unfounded. No better evidence of the good faith of both said Ireland and the railway company in entering into the original contract could be furnished than is afforded by their subsequent transactions above outlined. These facts all appeared in evidence before the land department.

The right of the parties to a contract to place a practical construction thereon and to give it an interpretation, is so well recognized that we cite but few authorities.

In Reissner v. Oxley, 80 Ind. 580, the court says, "The rights of parties to put an interpretation up-

on their contracts even to the extent of doing away practically with the ordinary and plain meaning of terms, cannot well be denied, so long as their interpretation does not result in a contract which for some reason is in itself unlawful and the cases are numerous and consistent, which permit a resort by the proof of the circumstances or situation of the parties when their contract was made and of their transactions under it, when its terms are of doubtful or ambiguous meaning, for the purpose of arriving at the true intention, and when this is done, the question must be left to the decision of the jury."

An interesting opinion on this question of the interpretation of contracts by the practical construction placed thereon by the parties, is that delivered by Judge Bliss in St. Louis Gas Light Co. v. City of St. Louis, 46 Mo. 121, where the question was whether a contract between the parties (which provided specifically for 263 lamps and, in respect to prices, stated that the same was to govern lamps "herein contracted for") should be construed to mean that the price should relate to all lamps, the same as if they had used the phrase "herein provided for," instead of "herein contracted for," the latter construction was given to the contract as being evidently what was intended by the parties, instead of what they had expressly provided, the court saying:

"Our daily experience impresses us with the imperfection of common language, and shows the errors into which we contsantly stumble in the use of the most important medium we possess for the communication of ideas. Such is the indefiniteness of words and phrases in daily use, and of so many meanings and shades of meanings are they susceptible, according to their arrangement, application,

figurative or provincial use, or the different ideas attached to them on different occasions, that no science or special art can be taught, and no mechanical occupation can be prosecuted, without the precision of technical terms and phrases.

"And if simple words and phrases so fail to communicate ideas with accuracy and precision, so much more may parties to a long and complicated agreement not only fail to understand it alike, as is shown by every day's disputes, but if they agree in its meaning, they may give it an interpretation different from that which the court, accustomed to greater precision of language, would consider the most natural. In a case of that kind whose interpretation should prevail? If the court gives one differing from that understood by the parties, it in effect makes a new agreement—the very thing most to be avoided. If it leaves the parties to be governed by their understanding of their own language, it in effect enforces the contract as actually made. That they should be so permitted to construe their own agreement accords with every principle of reason and justice."

In the opinion the court cites the case of Patterson v. Camden, 25 Mo. 13, where the court say:

"The practical construction of the notice, given by the parties themselves, or the acts of the parties in regard to the subject matter under the notice, may be properly looked to, properly taken into consideration, in order to ascertain what meaning the parties intended to attach to the instrument. This practical construction given by the parties themselves is a proper guide to its meaning, and is of more importance than what is th eabstract meaning which this court may attach to its mere phraseology."

Also the case of Whitehead v. Bank of Pittsburgh, 2 Watts & Serg. 172, where the court said: "I know of no better mode of ascertaining this

meaning than is shown if all parties acted on a particular meaning."

Also Chapman v. Bluck, 5 Scott C. P. 515, where the question was whether a certain agreement constituted a lease or only an agreement to lease; and the court not only considered the correspondence making the alleged demise, but also subsequent acts and declarations of the tenant; saying, through Tyndall, J.—"But we are also at liberty to look at the acts of the parties, than which there cannot be a better means of ascertaining their intention;" and Parker, J., after stating the general rule as given by Lord Ellenborough, "that the intention of the parties as declared by the words of the instrument must govern the construction," adds "the subsequent acts and declarations of the parties may be looked to in aid of the construction."

"Where the language of a contract is equivocal in *itself, or is made so by proof of extrinsic circumstances*, so that it is susceptible of more than one construction, oral evidence is competent to show the situation of the parties and to enable the court to be surrounded by the same circumstances as the parties were, and to look at the contract in the same light as they did, and thus to aid the court in applying and construing the language of the contract."

Brown v. Fales, 139 Mass. 21 S. C. 29 N. E. Rep., 211.

Chief Justice Marshall, in Etting v. Bank, 11 Wheat. 59, states the law as follows: "Although it is the province of the court to construe written instruments, yet where the effect of such instruments

depends, not merely on the construction and meaning of the instrument, but upon collateral facts in pais, the extrinsic circumstances, and inferences of fact to be drawn from them are to be left to the jury."

In West v. Smith, 101 U. S. 270, the doctrine is thus expressed:

"Doubtless the general rule is that it is the province of the court to construe written instruments, but it is equally well settled that when the effect of the instrument depends not merely on its construction and meaning, but upon collateral facts and circumstances, the inference of fact to be drawn from the paper must be left to the jury; or, in other words, when the effect of a written instrument collaterally introduced in evidence depends not merely on the construction and meaning, but also on extrinsic facts and circumstances, the inferences to be drawn from it are inferences of fact and not of law, and of course are open to explanation."

"Where the intention is obscure or doubtful, and extrinsic evidence can be invoked, no evidence is more reliable or entitled to greater consideration as manifesting what their intention was, than the acts and conduct of the parties themselves."

Citizens Fire Ins. Co. v. Doll, 35 Md. 107.

"When the intent of the parties is doubtful, the construction upon it by the manner in which it has been executed by both or one with the express or implied assent of the other, furnishes a rule for its interpretation."

Williams v. McHatten, 16 La. An. 196.

When there is any ambiguity, construction by acts of the parties will prevail when not wholly at variance with correct legal interpretation."

Matthews v. Danahy, 26 Mo. App. 660.

In Topliff v. Topliff, 122 U. S. 121, the question was as to whether the contract made by the parties in 1870 continued more than five years, and to what articles it applied. It was shown that the parties acted under it after that date, with reference to the articles in question. The court says:

"The operations of the parties in the manufacture and sale of the article were carried on and continued to enlarge and prosper and became profitable, and the parties thereto acted upon the assumption and understanding that the article thus manufactured was the article contemplated by the contract between them. If there were any doubt or ambiguity arising from the words employed in the clause of the contract under consideration, they would be effectually removed by this practical construction continuously put upon them by the conduct of the parties for so long a period. In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling influence. The interest of each generally leads him to a construction most favorable to himself and when the difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But in an executory contract and where its execution necessarily involves a practical construction, if the minds of both parties concur there can be no great danger in the adoption of it by the court as the true one."

We respectfully submit that the opinion of the Supreme Court of Minnesota on the three controlling points of the case is well supported by the authorities, and by the manifest merits, and the judgment should be affirmed.

1. The decision of the Land Department as to Ireland's qualifications to make entry under the 5th section of the law of 1887, was the decision of a question of FACT.

2. By reason of the clear priority of Ireland's right under the law of 1887, and the duty of the land department to determine that right before the claim of any homesteader could be considered, and for the further reason that in the consideration of this inherently prior right the land department found as a fact that Ireland was fully qualified and his entry under the 5th section of the law of 1887 was allowed, —the plaintiff in error never acquired such a right in the land by his occupancy and his tardy homestead application, as to be in a position to call in question the action of the government in disposing of its land to Ireland.

Counsel for plaintiff in error entirely overlook the priority of the right of a "purchaser" under this act, over a homesteader, notwithstanding its plain terms, and the uniform construction thereof by the Land Department. Counsel seem to contend that the claim of such a purchaser, ought to be looked upon with disfavor, and defeated if any excuse for so doing could be found. If the congress wished such claims defeated it never would have passed this remedial law.

The undertaking of Archbishop Ireland under his contracts with the railway company, was not in its nature speculative but philanthropical. It was not a scheme to withhold from settlement any portion of

the public domain, but rather a benevolent attempt to promote settlement and to secure homes at a nominal cost for actual settlers on a part of the public domain, which was at the time closed to settlement under the homestead or pre-emption laws. When an appeal is made on behalf of the homes and families of settlers, it must be borne in mind that there were many more homes established on these lands under the provisions of this law of 1887, than could now be established by passing over Ireland's title to these few squatters. Ireland and his grantees paid a price for this land, and plaintiff in error is attempting in this action to have the title acquired and paid for by Ireland passed over to him in this action, without even offering to repay the amount paid to the government for the land. Plaintiff in error is not asking that Ireland's title be cancelled, but that it be decreed to be held in trust for his benefit.

The undertaking of Ireland was a great and creditable enterprise, and the colony established by him on these lands has flourished and built up the country. Instead of being treated with disfavor, we believe it is entitled to the most favorable consideration, and that seems to have been the view of every tribunal before which the question has been brought in this long litigation.

3. The contract between Ireland and the railway company, with the construction placed upon it by the parties, substantially executed as it was at the time of the cancellation of the railroad selections, brought him—under his second contract,—and his vendees—

under his first contract,—clearly within the intent and meaning of the 5th section of the act of 1887, as bona fide purchasers of the lands from the railroad company.

Respectfully submitted,

E. T. YOUNG and
STEVENS, O'BRIEN, COLE & ALBRECHT,
Attorneys for Defendant in Error.

[illegible]

[illegible]

No. 55.

JACOB GEETGENS, Plaintiff in Error,

vs.

JOHN P. O'CONNOR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR SUBMITTED BY KERAN J. O'BRIEN, COUNSEL.

E. T. Young and
Stevens, O'Brien, Cole & Aldrich,
Attorneys for Defendant in Error.

Judd & Detweiler, Printers, Washington, D. C. [illegible]

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 65.

JACOB GERTGENS, PLAINTIFF IN ERROR,

vs.

JOHN P. O'CONNOR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

Believing that every question arising upon this writ of error has been conclusively settled by recent decisions of this court, and that, because of the conclusions reached in some of them, it is important to the interests we represent that the radical difference between the acts then construed and that affecting the case at bar be kept clearly and steadily in view, we have asked leave to supplement the brief heretofore filed with a few additional citations and suggestions

This course is perhaps also justified by the complexity of the "stipulation of facts" (Record, fol. 95–181), which pur-

ports, in some places, to recite certain events as *facts*, as at folio 95, where the following occurs:

"THAT SAID TRACT WITH OTHER LANDS WAS WITHDRAWN FROM SETTLEMENT AND ENTRY UNDER THE LAWS OF THE UNITED STATES BY EXECUTIVE WITHDRAWAL DATED MAY 25, 1869."

Then follow statements of the filing by the railway company with the proper officers, on April 22, 1885, of selections of these lands as indemnity lands to compensate it for losses along its main line; the action of the various officers of the Department from time to time, and then the statement that "the cancellation of all said selections was declared to be final by the said Commissioner of the General Land Office by his letter of October 23, 1896."

Every fact essential to plaintiff's cause of action, including the payment by him to the government of $1.25 per acre for the land, is stated in the stipulation *as a fact*, and yet counsel are controverting each of those propositions upon this argument.

But as to other matters there is much indefiniteness. For instance, in other places the stipulation recites the testimony given and proceedings had in the Land Department upon the successive hearings, varied occasionally by the introduction of a document like the stipulation embodied at folios 128, 129, from which appear, among other things, the *belief* by the defendant, on the one hand, and the *denial* by the plaintiff, on the other hand, that the defendant and his coadjutors had valid claims; and by an admission that those of them who had contracts from the grantor of the defendant in error and yet litigated with him were doing so upon the advice of counsel to the effect that neither he nor the railway company had or could secure title; and stipulating also that the rest of them, including

plaintiff in error, when they made their respective applications, or made settlements on the land, *knew* "*that the said tracts were then under a withdrawal* for railroad purposes under claims by the railway company as indemnity lands."

To add to the confusion, instead of excluding what was deemed inadmissible and having the rest of the testimony read to the reporter, so that it might appear as testimony taken upon the trial of *this action*, the transcript of the testimony presented before the Land Department appears in the record, interspersed with rulings of the trial judge, so that he appears to rule upon testimony which was not given in his court.

This judicial novelty culminates in a document entitled "Findings and Decision," the "Findings" being as follows:

"First" (the reasonably safe assertion), "that each and every *fact* set forth in said stipulation of *facts* (Exhibit 2) is *true*. Second, that each and every allegation of the pleadings, except as '*set forth*' in said stipulation, or admitted in the pleadings, is false and untrue."

In these conditions we think it inevitably follows, under the decisions hereinafter cited, that this court can predicate nothing upon these alleged "findings of fact," and that the sole question for consideration is whether in any circumstances, the existence of which this court has a right to presume, the Land Department would have been justified in awarding the land as it did, and that such question must be answered by affirmance of the judgment below.

ARGUMENT.

I.

THIS COURT WILL NOT REVIEW FACTS ESTABLISHED BY TWO CONCURRENT DECISIONS OF COURTS BELOW.

In Hyde *vs.* Booraem, 16 Pet., 169, where the question was as to the liability of a party to an alleged agreement to hold certain notes deposited with him until certain conditions were fulfilled, and then until they should be paid in a specific way, and against the makers of the notes, the defendants inserting separately, set up the conditions above referred to and their non-performance by the plaintiff intends exemption from liability on that ground. The trial court, holding the contract to be valid and binding, ordered judgment for the balance due thereunder. The opinion of this court was delivered by Mr. Justice Story, who said:

"One of the embarrassments attendant upon the examination of this cause in this court, is from the manner in which the proceedings were had in the court below. We have no authority, as an appellate court upon a writ of error to revise the evidence in the court below. In order to ascertain whether the judge rightly interpreted the evidence or drew right conclusions from it, we can only re-examine the law so far as pronounced upon a statement of facts and not merely a statement of the evidence of facts found in the record in the nature of a special verdict or an agreed case."

In Parks *vs.* Turner, 12 How., 39, the action was brought upon an indorsement of a promissory note. The defendant pleaded want of consideration, and that the instrument was a *nudum pactum* and void. There was a verdict for plaintiff and judgment entered thereon, and the case was brought

here upon writ of error. The opinion was delivered by Chief Justice Taney, who said:

"We certainly cannot adopt in this court the practice and mode of proceding in the appellate court of Louisiana; for a writ of error can bring up to this court nothing but questions of law."

And further (pp. 46 and 47):

"the second objection taken by the plaintiff in error (failure to produce the reasons for the judgment). Such a provision is inconsistent with the practice and mode of proceeding in the courts of the United States; for the reason upon which the opinion of an inferior court is founded forms no part of the record when a case is brought by writ of error."

In Lehnen *vs.* Dickson, 148 U. S., 71, the court held that mere recital of the testimony in the opinion of the trial court or in the bill of exceptions is not such special finding of facts as alone authorizes this court to review the rulings of the lower court; that the words "The district judge, after stating the facts as above, filed a statement preliminary to the opinion proper," did not constitute such statement and finding of facts by the judge. This court also held that the conclusion reached by the trial judge, that "the lease in question never was a valid instrument did not change the situation. It did not create it, only established the fact, and the affirmance of the decree was a final adjudication that from the first it was not binding. Certainly, in the absence of a finding to the contrary, we should not feel warranted from an examination of the testimony in coming to the conclusion that the acts of the defendant were characterized by good faith."

In Lloyd *vs.* Matthews, 155 U. S., 222, this court says:

"In the Supreme Court of the United States, when acting under its appellate jurisdiction, whatever was the matter of fact in the State court whose judgment or decree is under review, is a matter of fact there."

In Grayson *vs.* Lynch, 163 U. S., 468, the case was tried in the lower court without a jury and the decision and judgment of the trial court were affirmed by the territorial supreme court of New Mexico. There were fifty-three assignments of error taken to the introduction of testimony and to the finding of the principal facts. This court said:

"So far as this class of cases is concerned, they are left to be determined by the legal principles applicable to them in other jurisdictions; and, as regards the Federal practice, this court has held in a series of cases that the special finding of facts referred to in the acts allowing parties to submit issues of facts in civil cases to be tried and determined by the court is not a mere report of the evidence, but a finding of those ultimate facts upon which the law must determine the rights of the parties; and, if the findings of fact be general, only such rulings of the court in the progress of the trial can be reversed as are presented by a bill of exceptions, and that in such cases a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury."

Morris *vs.* Jackson, 9 Wall., 125.
Kearney *vs.* Case, 12 Wall., 275.
Miller *vs.* Insurance Co., *id.*, 385.
Insurance Co. *vs.* Folsom, 18 Wall., 237.
Insurance Co. *vs.* Sea, 21 Wall., 158.
Jennisons *vs.* Leonard, *id.*, 302.
Tying *vs.* Grinnell, 92 U. S., 467.
Insurance Co. *vs.* Boon, 95 U. S., 117.
The Abbotsford, 98 U. S., 440.

In Egan *vs.* Hart, 165 U. S., 188, the court say:

"On error to the state court the opinion of that court is to be treated as part of the record, and it may be examined in order to ascertain the questions presented, as may also be the entire record, if necessary, to throw light on the findings. The record before us contains 'all the testimony introduced and evidence offered in the trial court, all of which was open for consideration and passed upon by the supreme court of Louisiana.'

"On error, however, to a state court this court cannot re-examine the evidence, and when the facts are found below

is concluded by such finding. We, however, conclude that not only the very nature of the writ of error, but also the rulings of this court from the beginning, make it clear that on error to a state court in a chancery case, as in a case at law, *when the facts are found by the court below, this court* is concluded by such findings."

In Thompson *vs.* Maxwell Land Grant Co., 168 U. S., 451–456, the opinion reads: "Whenever the case comes from the highest court of a state for review, and by statute or settled practice in that state the opinion of the court is a part of the record, we are authorized to examine such opinion for the purpose of ascertaining the grounds of the judgment," citing 125 U. S., 18 and 39.

In Hyde *vs.* Bishop Iron Co., 177 U. S., 281; 66 Minn., 24 (31), Mr. Justice Brewer, in delivering the opinion of the court, said:

"We are not called upon to determine whether every step in this protracted controversy was carried on with technical accuracy in the matter of procedure, and it may be, as counsel contend, that upon some of the motions and in some of the contests testimony was received which was not pertinent to that particular phase of the controversy, but it is quite evident that in one form or another, on some motion or another, in some stage of the proceedings, all the facts and claims of either party were fully presented, considered, and determined by the Department. This is not a case on error, in which the regularity of every step taken in the Land Department is to be considered and determined, and upon that inquiry judgment entered, affirming or reversing its decision, but it is an independent suit in the courts in which the inquiry is whether the parties to the proceedings in the Land Department had full and proper notice of those proceedings, whether the Department heard the claims and evidence offered by each party, and then whether upon the facts as found by it there was any error in matter of law in its decision. It may be remarked in passing that there is no allegation of corruption or perjury, or any of the grounds upon which sometimes a court of equity will set aside the conclusion of another tribu-

nal, even where the proceedings are regular in form. And, as it is evident from the showing made in the cross-petition that both parties were often and fully heard and no limitation placed upon their right to offer testimony, we must accept as conclusive the findings of fact made by the Department, and inquire simply whether the law was properly adjudged."

In Chin Bak Kan *vs.* United States, 186 U. S., 193, the court say:

"Except in cases where the question of jurisdiction alone is certified, we have the power to dispose of the entire case; but as the jurisdiction of the Commissioner is sustained, we are of opinion that we cannot properly re-examine the facts or determine by true judgment below that is the general rule, and there is nothing to take this case out of its operation."

II.

THE GRANT IN QUESTION (ACT OF MARCH 3, 1857, 11 STAT., 195) DIFFERS ENTIRELY FROM THOSE WHICH THIS COURT HAS BEEN CONSIDERING DURING THE LAST TEN YEARS.

The most important matter before the court is the question of the character of the original grant from the Government to the Territory and State of Minnesota. In the case of Oregon & C. & R. Co. *vs.* U. S., 189 U. S., 103, upon which plaintiff in error strongly relies, the court had under consideration a land grant act approved July 25, 1866 (14 Stat., 239), which is substantially the same as the others above referred to, but entirely unlike that now under consideration. To make the comparison easier, the two acts are given below.

That there be, and hereby is, granted to the *said companies*, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of *public land, not mineral*, designated by odd numbers, *to the amount of twenty alternate sections per mile* (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected *by said companies* in lieu thereof, under the directions of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from

That there be and is hereby granted to the *Territory of Minnesota*, for the purpose of aiding, etc., every alternate section of *land* designated by odd number for six sections in width on each side of each of said roads and branches. But in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent, or agents, to be appointed by the *Governor of said Territory or future State* to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above *specified*, so much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached, as aforesaid; which *lands* (THUS SELECTED IN LIEU OF THOSE SOLD, and to which pre-emption rights have attached as aforesaid, TOGETHER WITH THE SECTIONS AND PARTS OF SECTIONS designated by odd numbers as aforesaid, and appropriated as aforesaid) SHALL BE HELD BY THE TERRITORY OR FUTURE STATE

sale public lands *herein granted* on each side of said railroad, so far as located and within the limits before specified (July 25, 1866; California & Oregon R. R. Co., 14 Stat., 239).	OF MINNESOTA FOR THE USE AND PURPOSE AFORESAID (11 Stat., 195; ap. March 3, 1857).

Some of the differences are as follows:

First. The act of 1857 was made to the Territory and future State, while the act of 1866 was made to the company direct.

Second. The act of 1866 excludes mineral lands.

Third. The grant to Minnesota was six sections per mile on each side for a short distance, while that to the Oregon company was twenty, for a long distance.

Fourth. The act of 1857 provides that in case it shall appear that the United States have, when the lines or routes have been definitely fixed, sold any sections or any parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, it shall be lawful for an agent of the State to select indemnity lands. The act of 1866, without referring to any date, provides that—

"when any of said sections or parts shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands shall be selected *by said companies* in lieu of those lost, and as soon as the companies file a survey of not less than sixty miles, the Secretary was to withdraw from public sale the lands therein granted on each side of the railroad as far as located and within the limits before specified."

Fifth. The right was reserved to add to, alter, amend, or repeal the act of 1866.

Sixth. The pre-emption and homestead laws were expressly extended by the act of 1866.

Seventh. There is significant difference in the granting terms.

Thus the language of the grant in 1866 is:

"That there be and is hereby granted every alternate section of PUBLIC LAND, NOT MINERAL, designated by odd numbers, to the amount of ten sections per mile on each side per mile."

There is no provision that the title to any lands but those which shall remain "*public lands, not mineral*," undisposed of at the time of the filing of the survey, whether in place or indemnity, is to be granted to any one. The withdrawal is to be made by the Secretary when a survey is filed, and there is nothing whatever which purports to grant anything but lands in place.

But when you look at the act of 1857, these words, which do not appear in the other, are found:

"*Which lands* (THUS SELECTED IN LIEU OF THOSE SOLD and to which pre-emption rights have attached as aforesaid, TOGETHER WITH THE SECTIONS and parts of sections designated by odd numbers, as aforesaid, and appropriated, not "GRANTED," as aforesaid) ARE TO BE HELD BY THE TERRITORY OR FUTURE STATE OF MINNESOTA FOR THE USE AND PURPOSE AFORESAID."

It is further provided—

"That the lands hereby granted FOR AND ON ACCOUNT OF said roads and branches severally shall be exclusively applied in the construction of that road FOR AND ON ACCOUNT of which such lands are hereby granted."

Section 2 provides that the even-numbered sections—that is, the sections and parts of sections of land which by such

grant shall remain to the United States—within six miles on each side shall not be sold for less than double minimum price.

Section 3 provides that the SAID LANDS HEREBY GRANTED to the said Territory or future State shall be subject to the future disposal of the legislature, etc. If the indemnity lands are not "hereby granted," *they* are nowhere made "subject to future disposal."

Section 4 provides for the manner of their disposal as the road is constructed, and, in the first line, the language is "that the LANDS HEREBY GRANTED TO SAID TERRITORY."

The importance of these distinctions will appear when we come to consider the course of reasoning by which this court in the case first above mentioned arrived at its conclusion. It is well understood that, until the decision of Secretary Lamar, it was the general, if not the universal, understanding that withdrawals reserved the land from sale and from disposition of every kind, until the question of their applicability to the grant on account of which the withdrawal had been made was finally determined.

That doctrine, as our experienced and epigrammatic opponent says at page 33 of his brief, received "its first rude shock" in the Department, in the decision of Secretary Vilas, in the case of Northern Pacific R. R. Co. *vs.* Miller (7 L. D., 100), wherein he held that "the statutory withdrawal once exercised was exhausted and could not be repeated." And that, as a consequence, "a tract of land not within the limits of the statutory withdrawal on general route of 1870, but falling within the indemnity limits on definite location, was free from the operation of the grant, and subject to appropriation under the general land laws."

Having examined the language of each of the grants in the cases cited in the dissenting opinion in the case of Oregon and California *vs.* United States, 189, 103, which we understand to be the latest and authoritative pronouncement of this court upon the subject, we respectfully and with great deference submit whether it is not possible, if not entirely practicable, to reconcile the apparent conflict between the construction therein given to the Northern Pacific land grant with the entirely opposite rule previously applied to grants of the character of the one here in question. The grant here in question is substantially identical with those involved in the cases first above referred to.

In the case of Oregon, &c., R. R. *vs.* U. S., 189 U. S., 103, the court construed the act of July 25, 1866, 14 Stat., 239, the language of which is substantially identical with that of the Northern Pacific grant and of every other act which has been construed with the same result. The opinion is largely based upon the case of Nelson *vs.* N. P. Ry. Co., 188 U. S., 108, as *that* was upon the case of Hewitt *vs.* Schultz, 180 U. S., 139, in both of which the charter of the Northern Pacific Company was involved. The last-named case, upon the authority of which it was held in the Oregon case that it was beyond the power of the Secretary to withdraw lands within indemnity limits of the grant made by the act of 1866 to the Oregon Company, contains an elaborate discussion based upon the language of the third section of the Northern Pacific act, in respect whereof the opinion states (p. 146):

"That this section has been often under examination by this court, and in repeated decisions it has been held that the act of Congress granted to the Northern Pacific Company, *only* public lands to which the United States had full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claim or rights *at the time this line of road was definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office,—lands that were, at that time, free from

pre-emption or other claims or rights, being excluded from the grant. * * * The cases all speak of the granted lands as those within the place limits."

After quoting the fourth section, providing for the appointment of examining commissioners and the issue of patents, the sixth section is quoted to the effect that the President shall cause the lands to be surveyed for forty miles in width on both sides of the entire line after the general route shall be fixed and as fast as may be required by construction, and then the following:

"And the odd sections of land HEREBY GRANTED shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act."

Then follows a clause providing that the pre-emption and homestead acts—

"SHALL BE, AND THE SAME ARE HEREBY, EXTENDED to all other lands on the line of said road when surveyed, except as is HEREBY GRANTED to said company. And the reserved alternate sections shall not be sold by the Government at a price less than $2.50 per acre when offered for sale."

The court then proceeds to state the contention that "construing the third and sixth sections again, it is clear that the words 'the odd sections of land hereby granted' in the first part, and the words 'excepting those hereby granted to the said company' in the latter part of the sixth section, refer to the lands described in the first section of the act; that is, to the odd-numbered sections in the place limits, which were free from pre-emption or other claims or rights, and had not been appropriated by the United States prior to the definite location of the road; that as to all other lands on the line of the said road when surveyed, the act expressly declares that the provisions of the pre-emption act of 1841 and the acts amendatory thereof, and of the homestead act of

1862, should extend to them; that "Congress took pains to declare that it did not exclude from the operation of those statutes any lands except those granted to the company in the place limits to the road which were unappropriated when the line of the road was definitely fixed; and that if at the time such line was 'definitely fixed' it appeared that any of the lands granted—that is, lands in the place limits had been sold, granted, or otherwise appropriated—then, but not before, the company was entitled to go into the indemnity limits beyond the forty-mile and within the fifty-mile line, and under the direction of the Secretary of the Interior, and not otherwise, select odd-numbered sections to the extent necessary to supply the loss in the place limits. It is also contended that the object of the reference in the sixth section of the Northern Pacific act, and the pre-emption and homestead acts, could only have been to bring the odd-numbered sections in the indemnity limits within the operation of those acts."

The opinion in the Hewitt case proceeds to state that this construction of the Northern Pacific charter finds support in the joint resolution of May 31, 1870 (16 Stat., 378), authorizing the construction of the road through the valley of the Columbia and providing that—

"In the event of there not being in any State or Territory at the time of its final location therein the amount of land per mile granted to it within the prescribed limit, it should be entitled under the direction of the Secretary of the Interior to receive as many sections designated by odd numbers therein within ten miles on each side, beyond the prescribed limits, as would make up the deficiency, excepting mineral and other lands, as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, subsequent to the passage of the act of July 2, 1864."

Thus providing a second indemnity limit for lands lost in the granted or place limit.

The opinion further states that the court do not find that the question of the power of the Secretary to withdraw lands within the indemnity limits of the Northern Pacific railroad was ever distinctly presented and disposed of prior to the year 1888, though mooted in respect to the Atlantic and Pacific grant (6 L. D., 84), wherein Secretary Lamar suggested that he should have doubt, if it were an original proposition, as to the legal authority of the Secretary to withdraw indemnity lands before ascertainment of definite losses, because the words of the act, "The odd-numbered sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act," indicate with most clearness the legislative will that no lands should be withdrawn, except odd-numbered sections, within the granted limits, as expressly designated in the act; but that when the next provision was considered, viz., that which extended the pre-emption and homestead laws to all "other lands on the line of said road when surveyed, excepting those hereby granted to said company," it was difficult to resist the conclusion that Congress intended that "all other lands excepting those hereby granted to said company" should be opened to settlement under the pre-emption and homestead laws, and to prohibit executive discretion.

The opinion in the Hewitt cases proceeds to state that in 1888 the question was directly presented to Secretary Vilas, in Northern Pacific Railroad Company *vs.* Miller, 7 L. D., 100, and that he held that the charter prohibited the withdrawal of any lands in the indemnity limits, and gave this reason: "As to the lands in the primary or granted limits: 'the title to the alternate sections to be taken within the limits, when all the odd sections are granted, becomes fixed, ascertained, and perfected in each case by the location of the line of road, and in case of each road, the title relates back to the act of Congress," citing St. Paul, &c., Railroad *vs.* Winona, &c., Railroad, 112 U. S., 720; M., K. & T. Rail-

way *vs.* K. P. Railway, 97 U. S., 491; Van Wyck *vs.* Knevals, 106 U. S., 360; Cedar Rapids & M. R. R. Co. *vs.* Herring, 110 U. S., 27; Grinnell *vs.* R. R. Co., 103 U. S., 739; but that as to indemnity limits the time when the road becomes vested is different in regard to those that are ascertained within the primary limits by the location of the line of roads; also referring to Ryan *vs.* Railroad Company, 99 U. S., 382, where the court said that the company did not and could not have any claim to it until specially selected, as it was for that purpose, and when a road was located, and the map made, the right to the odd sections first named to be fixed and absolute, but that with respect to the "lieu lands," as they were called, the right was only a float and attached to no specific tracts until the selection was actually made in the manner described; that the same idea was suggested, though not confirmed, in Grimm *vs.* R. R. Co., 103 U. S., 739, and that in Railroad Co. *vs.* Herring, 110 U. S., 27, the principle became the foundation of the judgment of the court rendered at the October term, 1899, and that the same principle had been announced at the term at which the Hewitt case was decided in the case of K. P. R. R. Co. *vs.* A., T. & S. F. Co., 112 U. S., 414; that the reason for this was that as no vested right could attach to the lands in place—the odd-numbered sections within six miles of each side of the road—until they were ascertained and identified by a definite location of the road, so in regard to the lands to be selected within a still larger limit, their identification could not be known until the selection was made.

That the consequence of the difference was that until a valid selection was made within the indemnity limits they were entirely open to disposition by the United States or to appropriation under its laws, and that the only purpose in bounding the indemnity line was to place a boundary upon the right of selection, to repair losses within granted limits, and that this court in the case of the K. C. P. R. R. *vs.* A., T. & S. F. R. R., 112 U. S., 473, and 112 U. S., 414, and in other

cases, had so specifically declared; that in the case last cited the court had said of the order of the Commissioner, so far as applicable to indemnity limits:

"The order of withdrawal of lands along the proper lines of defendant's road by the Commissioner, affected no roads which without it would have been acquired to the land. Nor in any respect controlled the subsequent grants; and that they were to be selected from adjacent lands, if any then remained, to which no other valid claim had originated. But what unappropriated lands would thus be found and selected could not be known before selection. A right to select them within certain limits, was alone conferred; and not a right to any specific land or lands capable of identification. That neither locality nor quantity was given, from which they might be ascertained. And that if, when a selection was to be made, the lands from which the deficiency was to be supplied had been appropriated to other purposes the right of selection became a barren right; for until selection was made the title remained in the Government, subject to its disposal at its pleasure. That it was in view of this difference and its consequences that the language of the granting act was employed by Congress, by which it was explicitly provided that the provisions of the pre-emption and homestead laws 'shall be, and the same are hereby extended to all other lands when surveyed excepting those granted to said company.'"

That if indemnity lands were to be regarded as "on the line of said road," that declaration appeared prohibitory to any withdrawal, and that the prohibitive language was introduced in the same section which declared the granted lands exempt from sale; and immediately following that declaration, and in the same sentence, so as obviously to mark the legislative intent to make clearly distinguishable the lands beyond the granted limits, as being liable to disposition under those laws; and that having so explicitly declared, it was not necessary to add a prohibition, because it gave, to any one entitled, the absolute right to acquire the proper quantity, of which no executive officer could deprive him.

That the act made such acquisition as much his right as it made it the right of the company to take the others, and he says, "I cannot be satisfied with the idea that this language was so introduced in immediate qualification of and distinction upon the words rendering lands in the granted limits 'not liable to sale or entry' for the mere purpose of declaring 'what was already enacted by general laws.'" That the general laws applied without this declaration, and they applied more extensively than this would apply them, since by the general laws entries of other kinds might, if conditions concurred, be also made. That the aim of that language was, as he was forced to read it, toward the availability to settlement of all lands not granted.

And then the vastness of the grant and of the threatened evil that it forebode is discussed.

Then the Secretary suggests that the decision in the case of U. S. *vs.* Burlington, etc., R. R. Co., 98 U. S., 334, appears to have fairly set the question at rest in holding that the land was taken "along such lines" in the sense of the statute when taken along the *general direction* within perpendicular lines, and that the same terms were used in the Union Pacific grant, whose lateral limit was twenty miles. That if a section at that distance could be said to be along its line, it was difficult to give another meaning to the language; that it did not require the land to be contiguous, and therefore it was not easy to say at what distance land to be selected would cease to be along the line.

And then the opinion in the Hewitt case proceeds to state that Secretary Smith in the case of N. Pacific R. R. *vs.* Davis, 19 L. D., 87, expresses concurrence in the views of Secretaries Lamar and Vilas, quoting the latter with approval, but adding that Congress in the same section had gone further, and, not content with embodying a withdrawal, had expressly prohibited from making any other withdrawal, when it said in the next clause that the provisions of the pre-emption and homestead laws should be extended to all other

lands excepting those "HEREBY GRANTED TO SAID COMPANY," and that this was an enactment in which the most comprehensive language was used, and that it would seem to follow logically that when it was commanded that the pre-emption and homestead laws should be extended "to all other lands," it was all those lands within the limits of the grant which had not been otherwise disposed of by the act. The "other" lands within the limits of the grant were the reserved sections and the odd and even sections within the indemnity limits.

The opinion in the Hewitt case, after stating that it was admitted upon the argument that the construction of the Northern Pacific act announced by Secretary Vilas had since been adhered to in the Department, and that the court was asked to overthrow it, declared that, without considering the matter as if for the first time presented, it was sufficient to say that the question could not be said to be free from doubt; that the intention of Congress had not been so clearly expressed as to exclude construction or argument in support of the view taken by these Secretaries and upon which the Department has acted since 1888, as it was admitted had been done upon numerous occasions.

To recapitulate:

It is beyond dispute that from 1857, at least until 1888, nearly a third of a century, the uniform construction and practice of the Land Department, sanctioned in all courts and places, had recognized the propriety and efficacy of such withdrawal, not only as to those grants which contained no such restrictive terms as even held to prohibit withdrawals, but likewise as to them, and if, as stated in U. S. *vs.* Ala., &c., R. R., 142, U. S., 615, cited evidently as influential in the opinion in the Hewitt case, the judicial department in case of ambiguity, such as even the imperative and plainly expressed language above quoted, did not suffice to solve, "will lean in favor of a construction given to a statute by the Depart-

ment charged with the execution of such statute, and if such construction be acted upon for a number of years, will look with disfavor upon any sudden change whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced," and, as stated in the opinion in the Hewitt case, "these observations apply to the case now" (then) "before us," (the court), "and lead to the conclusion that if the practice in the Land Department could with reason be held to have been wrong, it cannot be said to have been so plainly or palpably wrong as to justify the court for the lapse of so many years in adjudging that it had misconstrued the act in question."

By how much more is the court bound to follow the construction, which in respect of the act now in question, has been uniform and invariable for half a century, not only in the Department, but in all other places.

Analysis of the opinion in Hewitt *vs.* Schultz, and of the cases therein referred to and relied upon, shows that the grounds upon which the court based its decision that the Northern Pacific railroad land grant did not take effect, even as to lands in place, until the maps of definite location had been filed in the office of the Commissioner and approved by him, and that as to indemnity lands it did not take effect until the same had been selected and approved by the Commissioner, were as follows:

1st. The uniform judicial recognition of such limitation.

2d. The logical conclusion resulting from a comparison of the language of the third and sixth sections, where no other construction is reasonably admissible.

3d. The fact that pre-emption and homestead rights were by the same act extended to all lands not thereby granted.

4th. The influence of the opinion of Secretaries Lamar and Vilas that the language of the act extending such pre-emption and homestead rights was not simply declaratory of existing law, but was an essential step in the application of those rights unmistakably to all lands not reserved.

5th. The serious and lasting consequences of establishing or maintaining a wrong precedent in such a matter.

6th. The unmistakeable intent of the particular language used in applying the pre-emption and homestead rights to both even and odd numbered sections and the grant to the former only.

7th. The controlling influence in case of ambiguity, as this was admitted to be, of uniform and long-continued practice of the Land Department, which was specially charged with the administration of the act.

Examination of the act of March 3, 1857, will satisfy any one that none of the reasons for the construction which the Department and the courts have given the Northern Pacific charter and other like acts can be urged against the former, because, first, there has been no uniform judicial recognition of such a limitation as applied to the act of 1857. On the contrary, this is the first time, so far as we know, that any question has been raised as to the general objection and action thereunder which was initiated by Secretary Lamar without attempting to distinguish between one railroad land grant and another. On the contrary, the very action now complained of shows that the usage of the Department has been in accordance with the construction for which we contend.

2. There is no logical or other conclusion to result from a comparison of the language of the third and sixth, or any

other section, because there is no language like that in the Northern Pacific act to be compared or contrasted.

3. There is no deduction to be made from the fact that pre-emption and homestead rights were extended over the lands involved covered by the grant, because nothing of the kind was ever done or attempted in any manner.

4. The influence of the opinion of Secretaries Lamar and Vilas as to the persuasive effect of the language extending such rights does not exist, because there is no such language in the act.

5. The extent of the grant to the State of Minnesota by the act of 1857 is so inconsiderable as compared with the immensity of the Northern Pacific grant as to have no weight in that respect.

6. There is no unmistakable intent in that direction to be derived from the language of the act or any difference in its application to even and odd numbered sections.

7. Even if ambiguity existed, the controlling influence of uniform and long-continued practice of the Department is in support of our contention, because never to our knowledge has a grant in the language of the act of 1857 been construed by the Department or officer thereof whose attention was specially called thereto otherwise than as we contend, while it is beyond dispute that for forty years every such grant has been so construed.

Every reason, therefore, which induced the decision in Hewitt *vs.* Schultz is absent from the present controversy, while many and cogent reasons exist to the contrary.

In Newhall *vs.* Sanger, 92 U. S., 761, it was held that the words "public lands" exclude those which are *sub judice*, and are habitually used in our legislation to describe such as are subject to sale or other disposition in general laws and is not restricted against their *lawful* claims.

In Johanson *vs.* State of Washington, 157 U. S., 320, one claiming to act in behalf of the former Territory selected certain school sections. Thereafter action was commenced against an alleged trespasser upon land thus selected. Upon the argument that authority of the State agent to make the selection was questioned.

The court held that, by the prosecution of the action, the State ratified what he did as agent, and proceeded thus:

"The approval, by the Secretary of the Interior, of a selection by one claiming to be the agent of a Territory or State, of land in lieu of school sections 16 and 36 is, if nothing more, in effect a withdrawal from private entry of the selected land, and such withdrawal continues until the approval of the selection is itself set aside. Whether said selection so approved shall afterwards ripen into and fill legal title or not is immaterial so far as the question of withdrawal is concerned. While the land remained subject to such claim and approval, no individual could come in and question its validity. And, further, it must be remembered that the general supervision of the affairs of the Land Department is now vested in the Secretary of the Interior, and that, unless Congress clearly designates some other officer to act in respect of such matters, it will be assumed that *he* is the officer to represent the Government."

In Spencer *vs.* McDougal, 159 U. S., 161, this court said:

"An order withdrawing from sale all lands in a certain district is sufficient to defeat a subsequent pre-emption."

In the case of Gonzales *vs.* French, 164 U. S., 338, the plaintiff was in possession of a school section in Arizona when Congress passed an act authorizing the probate judge

of the county to enter in the land office a tract of which parts were in possession of plaintiff, which was all he did. The plaintiff claimed that the passage of the act relieved the land from the school reservation, and that his possession gave him precedence to the entry of the probate judge. This court said:

"Whatever might have been the possessory rights of the plaintiff in error as against other claimants under the ordinary land laws, such rights could not avail against the right of Congress to confer said lands upon other parties (Frisbie *v.* Whitney, 9 Wall., 187; Yosemite Valley Case, 15 Wall., 77; Shepley *v.* Cowan, 91 U. S., 330). We cannot accede to the argument on behalf of the plaintiff in error that the legal effect of the act of February 13, 1889, was to leave the land described therein open to controversy between townsite settlers and persons who might have settled on the lands, but had not complied with the requisites of the pre-emption laws."

The act construed in Northern Pacific R. R. *vs.* Musser-Sauntry, etc., Co., 168 U. S., 604, was in all respects, except personal details, identical with the act of March 3, 1857. This court construing the former, Mr. Justice Brewer, delivering the opinion of the court, said:

"But a single question is presented in this case, and that is, whether the withdrawal from sale by the Land Department in March, 1866, or of lands within the indemnity limits of the grant of 1856 and 1864, exempted such lands from the operation of the grant to the plaintiff. It will be perceived that the grant in aid of the defendant railway company was prior in date to that to the plaintiff, and that before the time of the filing of plaintiff's maps of general route and definite location the lands were withdrawn for the benefit of the defendant. The grant to the plaintiff was only of lands to which the United States had 'full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed.'"

"The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid, and operated to withdraw

the odd-numbered sections within its limits from disposal by the land officers of the Government under the general land laws. The act of the Secretary was in effect a reservation."

"It is said that the phraseology of the various congressional grants is different and therefore each one must be considered by itself. This, in a general way, may be admitted; but at the same time the frequent use of a certain word in a particular sense is, to say the least, very persuasive that it was used in a like sense in this grant."

Referring to the withdrawal, the court further say:

"Evidently when the withdrawal was made in 1866 it was an appropriation of these lands so far as might be necessary for satisfying that particular grant. It is true it was not a final appropriation or an absolute title or passage of title to the State or the railway company, for that was contingent upon things thereafter to happen: first, the construction of the road, and, second, the necessity of resorting to those lands for supplying deficiencies in the lands in place; still it was an appropriation for the purpose of supplying any such deficiencies. Again, in the description, are the words 'free from pre-emption or other claims or rights.' Certainly after this withdrawal, the Wisconsin Company had the right, if its necessities required by reason of a failure of lands in place, to come into the indemnity limits and select these lands. Can it be said that they were free from such right when the very purpose of the withdrawal was to make public the exercise of the right? But the language is not simply 'free from rights,' but 'free from claims,' and surely the defendant railway company had an existing claim."

While there is a qualification near the end of the opinion to the effect that title to indemnity lands dates from selection and not from the grant, yet there is no modification of the rule that the withdrawal operates to except the lands withdrawn from later disposition.

The following is stated in the case of N. P. Ry. Co. *vs.* Townsend, 190 U. S., 267:

"In respect of the *right of way*, the language of the act of Congress of March 3, 1857, was a present grant, though subject to exceptions expressly stated, in respect to the construction and operation of the road for the purposes designated; consequently, the rights conferred are not to be measured by those given by acts containing limitations and exceptions to which it was in no manner made subject. In U. S. *vs.* Alabama, &c., R. R. Co. 142 U. S., 615, it was declared that in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute; and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. These observations apply to the case now before us, and lead to the conclusion that if the practice in the Land Department could with reason be held to have been wrong, it cannot be said to have been so *plainly* or *palpably* wrong as to justify the court, after the lapse of so many years, in adjudging that it had misconstrued the act of July 2, 1864. The order of withdrawal by the Secretary of the Interior, upon which the title of the railroad company depends, being out of the way, there is no legal ground to question the title of the plaintiff to the land in dispute."

De Cambra *vs.* Rogers, 189 U. S., 119, was an action to set aside a patent claimed to have been obtained by fraud, and because, as alleged, the Secretary of the Interior did not read the testimony before deciding the appeal. The court say:

"It is well settled that the decision of the Land Department upon questions of fact is conclusive in the courts, and they will not entertain an inquiry as to the extent of investigation by the Secretary or his knowledge of the points decided, or as to the methods by which he reached his determination."

Upon the proposition that the determination of the Department is conclusive so far as the contract of Archbishop Ireland with the railway company was concerned, or of any

other evidential fact that goes to constitute the *ultimate* fact within the meaning of the act of 1887, we beg leave to submit the following additional authorities:

In Silver *vs.* Ladd, 7 Wall., 219, the court, having under consideration the "donation act"—commonly so-called—which perported to grant to every white settler or occupant above the age of 18 years, being a citizen or having declared intention to become such, with certain other qualifications, 320 acres of land if a single man, and 640 it married—half to himself and half to his wife—applied it in favor of a widow, giving the act the liberal construction for which we contend.

In Jeffries, Adm., *vs.* Insurance Co., 110 U. S., 305, the lower court found that there was a contract between the plaintiff's predecessor and certain attorneys for the prosecution of the claim upon a contingent fee, with authority to compromise, and that the plaintiff was bound by this contract made by his predecessor, saying:

"It was contended for the plaintiff in error that the evidence was insufficient to warrant the finding and that there was no contract between the first administrator and Mr. Laurie and Mr. Crews authorizing a compromise; the first administrator had no authority to make such a contract, or to make a compromise, with the sanction of the probate court. That the plaintiff was not bound by the contract made by the first administrator, and that Laurie had no authority to compromise without the co-operation of Crews as to the finding of facts, that there was a contract by the first administrator giving to the attorneys an interest in the proceedings of the claim with authority to compromise, but this court is prohibited, by section 1011 of the Revised Statutes, from reversing the case on a writ of error if any error in facts. In this case there was a dispute as to the facts and evidence on both sides, and it was a fair exercise of the judgment of the court on the evidence before it to make the finding of fact it did. Under such circumstances an erroneous finding of the facts cannot be held to be an error of

law" (Hyde *vs.* Booraem, 16 Pet., 169, 176; Park *vs.* Turner, 12 Howard, 39, 43)."

In the case of Noble *vs.* Mitchell, 164 U. S., 367, the supreme court of Alabama held that the evidence upon which the trial court found that a policy in question was issued by a foreign corporation was sufficient. This court said:

"It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the supreme court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error." (Dower *vs.* Richards, 151 U. S., 659; *In re* Buchanan, 158 U. S., 31).

In Hedrick *vs.* Atchison R. Co., 167 U. S., 673, the trial court found as follows:

"And the court further finds that the plaintiff is not a purchaser of said land in good faith, without notice of the defendant's estate therein, but he is chargeable with full knowledge of all the rights, equities and estate of defendants in and to the said premises, and holds legal title, evidenced by said patent, as trustee for the defendant railroad company's lessor, the Chicago, Santa Fe & California Railway Company, and that plaintiff is not entitled to recover in this action."

In Turner *vs.* People, 168 U. S., 90, this court held that the decision of the court below that a party was not in possession involved no question of law, but was a mere inference of fact from the evidence.

In Nobles *vs.* State of Georgia, 168 U. S., p. 398, the question was whether a so-called "resentence" of a criminal after the first sentence had been superseded was in legal effect but a fixing of a new date for the execution of the previous sentence which had remained constantly in

force. This court held that it was a question of fact and that the decision of the state court thereon could not be re-examined upon a writ of error, saying:

"We take notice of the finding of fact and follow the legal conclusion of the court."

In Stuart *vs.* Hayden, 169 U. S., 1, the question was whether a transfer by a stockholder in a national bank was made in good faith or with intent to escape liability. The trial court held that the latter was the case, saying:

"We will add that as the circuit court and the circuit court of appeals agreed as to what were the ultimate facts established by the elements, this court should accept their view as to the facts, unless it clearly appeared that they erred as to the effect of the evidence."

In San Jose Land and Water Co. *vs.* San Jose Ranch Co., 189 U. S., 177, the act of 1887 is thus referred to:

"The main purpose of this act was to relieve *bona fide* purchasers, from railway companies, of forfeited lands by permitting such purchasers or settlers to perfect their entries upon compliance with the public land laws. Assuming that Nolan & Heckenlively were *bona fide* purchasers in good faith from the Government, which indeed is a part of the finding, there is nothing to indicate that they had ever made payment to the United States for the lands or ever applied to do so."

In the case of Gardner *vs.* Bonestell, 180 U. S., 352, the 12th finding of fact was "that none of the grantees named in the deeds mentioned or referred to in the 18th paragraph of said cross-complaint *purchased* the lands or interest described or mentioned in said deeds *in good faith*," and the 13th was that the evidence introduced in the matter of the application and tests mentioned in the 19th paragraph of said cross-complaint did not show conflict or show at all that all of the facts set forth in the preceding paragraphs of said

cross-complaint were true, or that any of such facts which are denied in the plaintiff's answer herein are or were true. Upon a writ of error to this court the judgment of the court below was affirmed, and the opinion contained the following statement:

"The Land Department found and adjudged not only that the land in controversy was outside the exterior boundaries of the grant, but also that Throckmorton WAS NOT A PURCHASER IN GOOD FAITH. BOTH OF THESE FINDINGS WERE MATTERS OF FACT AND BASED UPON TESTIMONY. No proposition of law controlled such findings and no error of law is apparent. * * * The trial court in addition to its findings in reference to the proceedings of the Land Department found as independent matters of fact that the land in controversy was outside the exterior boundaries of the grant and that Throckmorton was not a *bona fide* purchaser.

"The supreme court of the state sustained those findings. Now, in proceedings in this court to review the action of state courts, we do not enter into a consideration of questions of fact. We accept the determination of those courts in such matters as conclusive, and inquire simply whether there have been errors of law."

In Hedrick *vs.* Atchison, etc., R. R., which was ejectment, to which defendant answered setting up the facts constituting defendant as trustee for defendant as to the title, the court below found as a fact that the plaintiff was not a purchaser of said land in good faith without notice of defendant's estate therein, but was chargeable with full knowledge of all the rights, equities, and estate of defendants in and to the said premises. The legal conclusion reached by the state courts upon such a state of facts was that the plaintiff was not entitled to recover, and that he held the legal title evidenced by said patent as trustee for the defendants. The determination of the Land Department in a case within its jurisdiction to questions of fact depending upon conflicting testimony is conclusive and cannot be challenged by subsequent proceedings in the courts.

III.

PLAINTIFF IN ERROR SEEKS EQUITY, BUT DOES NOT OFFER TO DO EQUITY.

The grantor of defendant in equity paid $1.25 per acre for the land, and while not asking cancellation, but a decree declaring the latter a trustee, without a suggestion of reimbursement.

The statement of this objection carries all the weight that that authority could possibly give it, and we refrain from so imposing upon the court.

Upon each of these grounds the judgment should be affirmed.

Respectfully submitted.

HIRAM F. STEVENS,
Counsel for Defendant in Error.

E. T. YOUNG,
STEVENS, O'BRIEN, COLE & ALBRECHT,
Attorneys for Defendant in Error.